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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DENISE BYRD, Plaintiff and Appellant, v. SANTA ANA UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	G041297 (Super. Ct. No. 30-2007-00100560) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed.

Reich, Adell & Cvitan and Carlos R. Perez for Plaintiff and Appellant.

Declues, Burkett & Thompson, Jeffrey P. Thompson, Jennifer K. Berneking and Gregory A. Wille for Defendant and Respondent.

* * *

Plaintiff Denise Byrd brought a petition for writ of mandate (Code Civ. Proc., § 1085) seeking back pay and related compensation from defendant Santa Ana Unified School District, claiming defendant violated several Education Code sections by not reinstating her immediately upon receiving her request to do so. The court denied the petition on grounds of preemption under the federal Labor Management Relations Act (29 U.S.C. § 185(a); LMRA.) Plaintiff contends the LMRA does not apply, and defendant agrees. Nevertheless, defendant argues, the judgment should be affirmed because the action is preempted by the Education Employment Relations Act (Gov. Code, § 3540 et seq.; all further statutory references are to this code unless other wise stated; EERA) and also is barred because plaintiff did not file a claim under the Government Claims Act (§ 810 et seq.). We agree the claim is barred due to plaintiff's failure to file a claim and affirm on that basis.

FACTS

This is the second time these parties have been before us. In the first case, as set out in more detail in our first opinion, plaintiff, a teacher employed by defendant, sued under the Fair Employment and Housing Act (§ 12920 et seq.) claiming defendant discriminated against her because she had a disability and failed to reasonably accommodate her. She appealed from a defense jury verdict, which we upheld. (*Byrd v. Santa Ana Unified School Dist*. (Dec. 12, 2005, G034953) [nonpub. opn.], p. 2.) Plaintiff's alleged disability was based on claimed mold and other toxins and a rat infestation in her classroom.

After plaintiff used all of her sick leave, in April 2003 defendant placed her on a 39-month reemployment list. In June 2005 plaintiff sent a letter to defendant asking to return to work part time. Apparently defendant did not reply to the letter. In October 2005, plaintiff's lawyer sent a letter to defendant stating that plaintiff wanted to return to

work, "assuming certain accommodations are made." These included working part time and in a classroom without "'a history of water intrusion, mold growth or other toxic substances.'" Included was a letter from plaintiff's treating physician, Gunnar Heuser, who stated he had "encouraged her to return to work on a trial basis" and reiterated the limitation on the classroom. About 10 days later defendant's lawyer responded that defendant would investigate and get back to plaintiff.

Within two weeks defendant's counsel sent another letter, which stated that, based on the prior judgment finding plaintiff had no condition requiring accommodation, defendant was not obliged to make any accommodations for her. It also said that plaintiff needed to agree to work full time and submit a letter from a doctor giving her a medical clearance to do so. Almost 60 days later plaintiff's lawyer replied that plaintiff would take a full time position as long as her prior demands as to the physical condition of the classroom were met. She also agreed to provide a letter from her doctor confirming this.

Over the next eight months the parties' lawyers exchanged a series of additional letters. Defendant disputed that it had to accommodate plaintiff's request for a mold- and toxin-free classroom but agreed to have the classroom examined. It required that plaintiff be examined by a physician of its choice to ensure that she was medically and psychologically able to return to work.

Plaintiff insisted that the condition of the classroom be as she demanded and disputed defendant's right to have her examined by its own physicians, relying on letters from her own doctor. She ultimately agreed to be examined by a doctor defendant selected, although not the one it originally suggested. She was released for work by her own doctor and by defendant's.

Thereafter defendant assigned her to a school. After plaintiff objected, defendant transferred her to another school, which was tested for mold and other toxins. Plaintiff returned to work in August 2006.

In December 2007 plaintiff filed the writ petition, alleging that after her request in June 2005 defendant had a duty to reinstate her pursuant to various Education Code sections. She pleaded that defendant denied her a position for "most of the 2005-2006 school year" and summer sessions in 2005 and 2006, also in violation of the Education Code. She sought back pay with interest and benefits for this period. She then filed a motion for judgment.

The court denied the petition, ruling the action was preempted by the LMRA, which prohibits state actions where it is necessary to interpret a collective bargaining agreement.

DISCUSSION

1. Preemption

As plaintiff argues and defendant agrees the trial court erred when it held the subject matter of plaintiff's petition was preempted by the provisions of the LMRA. An employer under the LMRA does not include "any [s]tate or political subdivision thereof." (29 U.S.C. § 152(2).) Defendant is a subdivision of the state. (See *Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1105, 1115 [school district is "arm of the state" for purposes of [Eleventh Amendment].)

Defendant contends, however, that although the trial court relied on an incorrect theory, nevertheless the ruling is correct because the action is preempted by the EERA. We need not reach this issue because we affirm due to plaintiff's failure to file a claim under the Government Claims Act, as defendant asserted in the trial court.

2. Government Claims Act

Defendant asserts the petition is barred because plaintiff failed to timely file a claim under the Government Claims Act. Section 905 requires a claim against a "local

public entit[y]" that seeks money or damages to be presented to its board before a civil suit is filed. But section 905, subdivision (c) exempts from that requirement "[c]laims by public employees for fees, salaries, wages, mileage, or other expenses and allowances" and subdivision (f) excepts claims for public retirement plan benefits.

Plaintiff maintains her claims for back pay and benefits fall within that exemption. We agree. *California School Employees Assn. v. Azusa Unified School Dist.* (1984) 152 Cal.App.3d 580 held those exceptions "relate[] only to claims which are not based on contractual or tortious theories of recovery. [Citations.]" (*Id*. at p. 586.) The salary and benefits plaintiff seeks for the period during which she argues defendant denied her reinstatement are based on violations of the Education Code. This distinguishes her claim from that in *Hanson v. Garden Grove Unified School Dist.* (1982) 129 Cal.App.3d 942, where the plaintiff sought to recover tort damages and thus was required to file a claim. (*Id*. at p. 948.)

Defendant maintains that even if section 905 applies, plaintiff was still required to file a claim pursuant to section 935, which provides that "[c]laims against a local public entity for money or damages which are excepted by Section 905 . . . shall be governed by the procedure prescribed in any . . . regulation adopted by the local public entity. [¶] . . . The procedure . . . may include a requirement that a claim be presented and acted upon as a prerequisite to suit thereon." (§ 935, subds. (a), (b).) Defendant has a regulation that requires "[c]laims for money or damages as authorized in . . . [section] 905 . . . [to be] filed not later than one year after the accrual of the cause of action" and such claims "specifically excepted from . . . [section] 905 [to be] filed not later than six months after the accrual of the cause of action." (Santa Ana School Dist. Admin. Reg. No. 3320(a)(2), (3).) This regulation bars plaintiff's action.

Plaintiff argues defendant's regulation is invalid on its face because the portion dealing with claims excepted from section 905 sets a six-month time limit, in violation of section 935, subdivision (c), which declares that any regulation adopted by a

local entity "may not require a shorter time for presentation of any claim than the time provided in Section 911.2." She points to section 911.2, subdivision (a) that provides a one-year period for presenting a claim. But plaintiff never filed a claim at all. This bars her action in any event and we need not deal with the purported invalid time requirements of defendant's regulation.

Nor do we agree plaintiff's correspondence with defendant about her reinstatement constituted substantial compliance with the claim-filing requirements. As plaintiff acknowledges, "'The primary function of the claims act is to apprise the governmental body of imminent legal action so that it may investigate and evaluate the claim and where appropriate, avoid litigation by settling meritorious claims. [Citations.] . . . If the claim satisfies the purpose of the act without prejudice to the government, substantial compliance will be found. [Citations.]' [Citation.]" (*California School Employees Assn. v. Azusa Unified School Dist., supra*, 152 Cal.App.3d at p. 588.) Here, plaintiff's letters did not adequately inform defendant of "imminent legal action."

DIPSOSITON

The judgment is affirmed. Respondent is entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.